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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JAWON HAWKINS,

Defendant and Appellant.

C086100

(Super. Ct. No. 14F2844)

Defendant Anthony Jawon Hawkins's sole challenge to the judgment on appeal is the trial court's imposition of consecutive sentences, contending it was a violation of Penal Code section 654.¹ In supplemental briefing, defendant contends, and the People agree, that his one-year prior prison term enhancement should be stricken pursuant to Senate Bill No. 136 (Senate Bill 136). We reverse the judgment with respect to the one-

¹ Undesignated statutory references are to the Penal Code.

year enhancement and remand for the trial court to strike the one-year term as improper under Senate Bill 136 and resentence defendant accordingly. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND²

On May 14, 2014, defendant returned to the home he shared with his girlfriend, L.B., and her mother, L.J. Seeing that defendant was drunk and agitated, L.B. asked him to leave. Defendant refused and began arguing with L.B. He pushed her onto the bed and began choking her. When defendant loosened his grip, L.B. wiggled free and escaped to the living room where she called L.J. and summoned her to the house.

For the next several hours, defendant argued with L.B., grabbed her, pushed and shoved her, slammed her to the ground, and choked her several times with his hands making it difficult for her to breathe and causing her to become light-headed. During that time, L.J. returned home with a friend. Both L.J. and the friend witnessed defendant choking L.B. and tried to intervene.

Eventually, the friend left. Thereafter, defendant reinitiated his assault on L.B., prompting L.J. to call 9-1-1. L.J. stepped outside onto the porch, as did L.B. Defendant followed, yelling at L.J. to hang up the phone. When L.B. tried to go back inside, defendant shoved her, causing her to trip and land flat on her back. L.B. tried to make her way to the bathroom but defendant followed her and slammed her up against the wall. As L.B. made her way back outside, she heard her mother begging the 9-1-1 dispatcher to send someone to help. Defendant followed L.B., grabbed her, and continued to choke her in the driveway. When he finally let go, she ran back inside and locked the door.

² Much of the factual background and procedural history is taken verbatim from this court's opinion in defendant's prior appeal, *People v. Hawkins* (June 6, 2016, C078160) [nonpub. opn.], which was made a part of the appellate record.

Defendant pounded on the door for approximately 15 minutes until Deputies Tim Estes and Gary Nunnelley arrived.

PROCEDURAL HISTORY

Defendant was initially charged by criminal complaint with false imprisonment (§ 236—count 1), three counts of corporal injury to a cohabitant (§ 273.5, subd. (a)—counts 2, 3, & 4), and two counts of misdemeanor resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)—counts 5 & 6). The complaint alleged defendant suffered a prior serious and violent felony conviction (§ 1170.12) and served a prior prison term (§ 667.5, subd. (b)).

Following the preliminary hearing, the court indicated its tentative ruling as follows:

“Well, what I am looking at is, before you argue, one count of [section] 273.5, given the evidence here.”

The prosecution argued the evidence of three separate incidents supported the three counts as alleged. The prosecution also argued the evidence of defendant “holding [L.B.] down and not letting her up for a minute” was sufficient to support the false imprisonment count.

Defense counsel argued the entire incident was an “on-going argument,” which could not be separated into three separate counts, and the evidence that defendant held L.B. down for one minute did not support a separate charge of false imprisonment.³

Agreeing with defendant that the evidence demonstrated a “continual string of violence” with “no separation,” the court concluded “there is a single [section] 273.5.”

³ Defense counsel conceded the evidence was sufficient to hold defendant on the two misdemeanor counts for resisting, obstructing, or delaying a peace officer (counts 5 & 6).

The prosecution filed a new information charging defendant with corporal injury on a cohabitant (§ 273.5, subd. (a)—count 1), false imprisonment by violence (§ 236—count 2), assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)—count 3), and two counts of misdemeanor resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)—counts 4 & 5), and alleging he suffered a prior serious and violent felony conviction (§ 1170.12) and served a prior prison term (§ 667.5, subd. (b)).

Defendant filed a motion to set aside the false imprisonment charge (count 2) pursuant to section 995. The trial court denied the motion.⁴

L.B. and her mother, L.J., both testified at trial. According to that testimony, defendant arrived at the apartment drunk and agitated. L.B. asked defendant to leave because she was not feeling well. An argument ensued when defendant refused to leave despite L.B.'s repeated pleas to do so. The argument escalated. The first assault occurred while L.B. and defendant were in L.B.'s bedroom. As L.B. continued to ask defendant to leave, defendant pushed L.B. onto the bed, put both hands around her neck, and began choking her, making it difficult for her to breathe. When defendant finally let go, L.B. left the bedroom and called L.J. Defendant followed her into the living room as she continued to ask him to leave.

The next assault occurred after L.B. hung up the phone. As she tried to make her way back into the bedroom to retrieve her cigarettes, defendant pushed her causing her to stumble into the wall. Defendant shoved her, causing her to land on her back on the hardwood floor. She screamed at defendant to leave as she got up, made her way back into the bedroom to retrieve a cigarette, and then came back out to call L.J. a second time. Defendant continued to argue with L.B. He shoved and choked her, restricting her ability to breathe and causing her to become light-headed. He also slammed her to the ground

⁴ The record does not contain a transcript of the proceedings.

several times as she pleaded with him to leave and tried to get up. Eventually, L.J. arrived at the apartment with her friend, R.M. Defendant refused to leave and continued to argue with L.B. in the living room. L.B. testified that defendant “got in my face.” She put her hand on his chest and again asked him to leave. When she turned to walk out of the apartment, defendant grabbed her by the arm and pulled her towards him. L.B. twisted away, but defendant grabbed both of her arms and attempted to pull her into the bedroom and close the door. L.B. yelled to L.J. for help. L.J. prevented defendant from closing the door; however, defendant threw L.B. on the bed and, with one knee on top of her, began choking her until she lost consciousness. R.M. intervened. Defendant stopped choking L.B., got up, and continued to scream obscenities until R.M. eventually calmed him down. L.B. went into the living room to talk to L.J. and defendant went back into the bedroom to lie down.

The next assault started approximately 30 minutes later, after R.M. left and L.B. went into the bedroom and lay down on the bed next to defendant to sleep. She nodded off to sleep but awoke to find defendant with his hands around her throat. L.B. jumped out of bed and told defendant, “[G]et the fuck out . . . I don’t care. This is done, stop.” She also told him he needed to call somebody to come get him. L.B. walked into the living room. Defendant followed her and began pushing and pulling her, slamming her face into a futon. When L.B. kicked defendant in an attempt to get away, defendant grabbed her by the crotch of her pants and slammed her to the floor. She stood up and he slammed her back to the floor. L.J. called 9-1-1 for help and went outside to the front porch. L.B. tried to make it to the front porch, making her way just outside the door when defendant pushed his way through and yelled at L.J. to hang up the phone. L.J. remained on the phone and walked off the porch to the front yard. L.B. tried to go back inside the house but defendant shoved her, causing her to lose her footing and fall into the house. When defendant put out his hand to help her up, she slapped it away and went to the bathroom. Defendant followed and slammed her up against the corner of the

bathroom wall. L.B. again made her way out of the bathroom and outside, but defendant continued to follow her and choked her in the driveway as L.J. begged police dispatch to send someone to help. Defendant finally let go and L.B. ran into the house and locked the door.

At the conclusion of trial, the jury found defendant guilty on all counts. In a bifurcated proceeding, the court found the alleged priors true. The court sentenced defendant to an aggregate term of nine years in state prison. Specifically, the court imposed the middle term of three years for the corporal injury conviction (count 1), doubled pursuant to the prior strike, plus a concurrent two-year term for the false imprisonment conviction (count 2), a consecutive two-year term (one-third the middle term) doubled for the assault conviction (count 3), a consecutive one-year term for the prior prison term enhancement, and two concurrent one-year terms for the two misdemeanor convictions for resisting a peace officer (counts 4 & 5).⁵ Defense counsel objected to the sentence on count 3, arguing it should either have been stayed pursuant to section 654 or run concurrent.

Defendant filed a timely notice of appeal contending: (1) the trial court erred in denying his section 995 motion to set aside count 2 (false imprisonment by violence), (2) the sentence on his false imprisonment conviction should have been stayed pursuant to section 654, and (3) the trial court erred in imposing a consecutive sentence on the aggravated assault conviction (count 3) based on a dual use of facts. With regard to the latter claim, defendant conceded he forfeited the claim due to his failure to object on the specific grounds asserted, but argued the failure to object was the result of the ineffective

⁵ In imposing sentence, the trial court misspoke, referring to the violation of section 273.5 as count 2 and the violation of section 236 as count 1, rather than vice versa as alleged in the information and reflected in the sentencing minute order and abstract of judgment.

assistance of his trial counsel requiring remand for resentencing on count 3. The People conceded the section 654 claim, but argued the trial court's denial of defendant's section 995 motion was proper and defendant had shown no prejudice as a result thereof. They further argued defendant forfeited his claim regarding the court's imposition of a consecutive sentence as to count 3.

This court affirmed defendant's convictions and, as relevant here, remanded the matter to the trial court for further proceedings as follows: "The judgment is modified to reflect that the sentence imposed for defendant's conviction for false imprisonment (count 2) is stayed pursuant to section 654. . . . The matter is remanded to the trial court for resentencing on count 3." The remittitur issued on August 10, 2016.

The resentencing hearing commenced over three days. On September 8, 2017, the court resentenced defendant to two years on count 2, stayed pursuant to section 654. On September 22, 2017, and October 6, 2017, the court heard oral argument regarding count 3. Defendant's counsel argued the conduct underlying the charge was part of "a continuing course of conduct" and therefore required imposition of a concurrent sentence. Stating count 3 was premised on defendant strangling L.B. while on the bed, "at the time the victim indicated that she thought the defendant was trying to kill her," the court found a "separate act or group of actions" constituted count 3. Based thereon, the court stated it intended to impose a sentence of one year (one-third the middle term), doubled for the prior strike, for an aggregate sentence of two consecutive years for count 3. Defense counsel again argued count 3 should run concurrent as "part of the entire transaction" of the section 273.5, subdivision (a) conduct, and that it should be stayed pursuant to section 654.

The court concluded as follows: "You know, in my mind, the district attorney chose to file one charge, the 273.5, over a long extended period of time, instead of filing individual separate 273.5s, which could have been filed, and different acts could have been set forth that the defendant would most likely have been convicted of, given the

verdicts that we have here. [¶] So, frankly, I think the defendant had had the break with the break in the action because of the way it was charged, but there are separate events. You're right. It was a long period of time, but separated within that period of time was the separate distinct action of the defendant of strangling the victim to the point where she felt she was going to die. So in my mind, that constitutes separate offense[s]." The court sentenced defendant to a consecutive term of two years on count 3.

Defendant timely appealed the sentence.

DISCUSSION

Defendant contends he committed counts 1 (corporal injury) and 3 (assault with force) with the same intent—to assault L.B.—and his assault on L. B. (count 3) occurred during the course of his corporal injury of her (count 1). Accordingly, the sole issue tendered by defendant is whether the trial court erred in failing to stay the sentence on his assault charge (count 3) pursuant to section 654. We affirm the judgment.

Section 654 provides in pertinent part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The statute does not prohibit multiple convictions for the same conduct, only multiple punishments. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.) "In such a case, the proper procedure is to stay execution of sentence on one of the offenses." (*Ibid.*)

In reviewing a challenge to the trial court's imposition of separate sentences for conduct asserted to be indivisible, we engage in a two-step test. (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312 (*Corpening*).

The two-step test under section 654 is based on the recognition that the statute's "reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective." (*Corpening, supra*, 2 Cal.5th at p. 311.) "We first consider if the different crimes were

completed by a ‘single physical act.’ ([*People v.*] *Jones* [(2012)] 54 Cal.4th [350,] 358.) If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single ‘intent and objective’ or multiple intents and objectives. (*Id.* at p. 359; see also *People v. Mesa* (2012) 54 Cal.4th 191, 199 (*Mesa*) [‘Our case law has found multiple criminal objectives to be a predicate for multiple punishment only in circumstances that involve, or arguably involve, multiple acts’].) At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. (See *Mesa, supra*, [] at p. 196.)” (*Corpening, supra*, at pp. 311-312.)

Step two of the analysis under section 654 requires us to consider whether the offenses involve multiple intents and objectives. (*Corpening, supra*, 2 Cal.5th at p. 311.) When “a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective.” (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) “ ‘A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.’ ” (*Ibid.*, quoting *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

“[I]f a series of acts are committed within a period of time during which reflection was possible [citation], section 654 does not apply.” (*People v. Kelly* (2016) 245 Cal.App.4th 1119, 1136.) “Under section 654, ‘a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]’ [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public

security or policy already undertaken. [Citation.]” (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

In applying step one of the two-step test here, we conclude the different crimes were not completed by a single physical act. The record demonstrates that, while defendant attacked L.B. numerous times over the course of approximately six hours, there were clear breaks between defendant’s attacks on L.B. First, defendant attacked L.B. in the bedroom, pushing her onto the bed and choking her. Next, when L.B. attempted to walk out of the apartment, defendant attacked her again by grabbing her, pulling her into the bedroom, and throwing her onto the bed, where he choked her until she lost consciousness. A third attack occurred when defendant assaulted L.B. as she attempted to leave the apartment.

We need not apply step two of the two-step test because the trial court found there were “separate events” between which defendant had a “break in the action,” and substantial evidence supports the court’s finding. (*People v. Islas, supra*, 210 Cal.App.4th at p. 129; *People v. Gaio, supra*, 81 Cal.App.4th at p. 935.)

Because defendant’s actions constituted separate attacks between which defendant had an opportunity to reflect, the trial court did not violate section 654 by sentencing him on both the corporal injury and the assault charges. (See *People v. Kelly, supra*, 245 Cal.App.4th at p. 1136; *People v. Gaio, supra*, 81 Cal.App.4th at p. 935.) In light of our conclusion that the trial court did not err by refusing to stay the sentence on the assault count, we need not reach defendant’s due process claim.⁶

⁶ We also reject defendant’s claim that the manner in which count 1 was charged determines the section 654 issue because “the application of section 654 does not depend on the *allegations* of the charging instrument, but on what was *proven* at trial.” (*People v. Assad* (2010) 189 Cal.App.4th 187, 201.)

We granted defendant's request to file supplemental briefing on the applicability of recently enacted Senate Bill 136 (2019-2020 Reg. Sess.), effective January 1, 2020. Senate Bill 136 amended section 667.5, subdivision (b), which now limits one-year prior prison term enhancements to convictions for certain sexually violent offenses. (See *People v. Lopez* (2019) 42 Cal.App.5th 337, 339.) Defendant contends—and the People concede—that his one-year term for his prison prior should be reversed under Senate Bill 136. We accept the People's concession as prudent.

The trial court imposed a one-year enhancement for defendant's prior prison term. However, defendant's prior prison term was not for a sexually violent offense. Accordingly, defendant is entitled to have his one-year enhancement for his prison prior stricken under Senate Bill 136 so long as it applies retroactively.

We agree with the parties that Senate Bill 136 applies retroactively to defendant's case. Under *In re Estrada* (1965) 63 Cal.2d 740, unless the Legislature provides otherwise, ameliorative legislation applies retroactively to all judgments that are not final when the legislation goes into effect. Defendant's judgment was not final on January 1, 2020, when Senate Bill 136 went into effect. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.) Accordingly, defendant is entitled to have his one-year prison prior enhancement stricken under Senate Bill 136. (See *People v. Jennings, supra*, 42 Cal.App.5th at p. 667 [holding Senate Bill 136 applies retroactively].)

DISPOSITION

The judgment with respect to the convictions is affirmed. The judgment with respect to the sentence is reversed, subject to the following directions. On remand, the trial court shall strike the one-year enhancement imposed for defendant's prison prior as improper under Senate Bill 136. The trial court is directed to resentence defendant

accordingly. After resentencing defendant, the trial court is directed to issue an amended abstract of judgment and forward a certified copy thereof to the Department of Corrections and Rehabilitation.

/s/
BLEASE, Acting P. J.

We concur:

/s/
HOCH, J.

/s/
RENNER, J.